Pacific Intercom Co. *and* International Brotherhood of Electrical Workers, Local 11. Case 31-CA-9360

March 23, 1981

DECISION AND ORDER

On November 13, 1980, Administrative Law Judge Gordon J. Myatt issued the attached Decision in this proceeding. Thereafter, the Respondent, Pacific Intercom Co., the Charging Party, International Brotherhood of Electrical Workers, Local 11 (hereinafter the Union), and the General Counsel filed exceptions and supporting briefs.[1]

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order, as modified below.

The General Counsel and the Union have excepted to the Administrative Law Judge's limitation of the remedy to the term of the collective-bargaining agreement repudiated by Respondent in 1979.[2] The Administrative Law Judge ruled that to extend the remedial order beyond the dates of the collective-bargaining agreement in effect at the time of Respondent's repudiation would be punitive and not remedial. The General Counsel and the Union argue that such a remedial limitation is contrary to the Board's policy as set forth in *Don Burgess Construction Corporation d/b/a Burgess Construction and Donald Burgess and Verlon Hendrix d/b/a V & B Builders.*[3] We find merit in the exceptions.

In *Burgess Construction*, the Board held that, as a matter of equity, when a respondent fraudulently conceals its unlawful conduct the 10(b) period of limitations is tolled from the date on which respondent's unfair labor practices commenced until the union acquires knowledge of the unfair labor practices.[4] The 10(b) period is tolled for the purposes of filing a charge as well as for purposes of fashioning a remedy.

The record reveals that, in June 1972, Respondent embarked on a long and elaborate journey of unlawful conduct aimed at deceiving the Union and depriving its employees of the fruits of their labor and the collective-bargaining process. On June 23, 1972, Respondent executed a private agreement with its employee Robert R. Spencer which provided, *inter alia*, for wage payments at less than the contractual wage rate and for a modified fringe benefits plan.[5] Furthermore, by issuing false pay stubs to its employees, by failing to use the Union's hiring hall when additional employees were needed, and by submitting false reports and payments based thereon to the various trust funds, Respondent further demonstrated its wide-ranging and continuing contempt for the Union and for the collective-bargaining process. Respondent's myriad unfair labor practices reflect a calculated and concerted effort to bypass the terms of the collective-bargaining agreement, and to disregard the mandate of the National Labor Relations Act. Accordingly, we find that, in order to effectuate more fully the policies of the Act, we shall order Respondent to comply with the terms of the Intercommunication and Sound Agreements retroactively to June 23, 1972, the date of the commencement of the unfair labor practices found herein. This includes making employees whole for the losses they incurred, and making the Union whole for the losses it incurred as a result of Respondent's unfair labor practices.[6] To rule otherwise would cause

[1] The General Counsel has filed a motion to strike Respondent's exceptions, and brief in support thereof, on the grounds that Respondent's exceptions were not timely filed with the Board in conformity with the requirements of Secs. 102.113 and 102.46 of the Board's Rules and Regulations, Series 8, as amended. Respondent mistakenly filed its exceptions with Region 31 of the NLRB and not with the Board in Washington, D.C. The General Counsel's motion is hereby denied since Respondent's exceptions and brief were accepted by the Associate Executive Secretary of the Board as misdirected to the Regional Office and, in such circumstances, they are deemed to be properly filed.

[2] The record shows that, in 1966, Ronald Podogil, the owner and sole proprietor of Respondent, entered into an agreement with the Union entitled, "Non-Association Members Signing Union Agreement." Respondent thereby agreed with the Union to be bound by the Intercommunication and Sound Agreement between the Los Angeles Chapter of the National Electrical Contractors Association (NECA) and the Union, until such time as written notice of revocation is given by either party not less than 90 days prior to the expiration of the Intercommunication and Sound Agreement. Shortly thereafter, Podogil signed a "Letter of Assent" agreement with NECA in which he authorized NECA to act as his collective-bargaining representative for all matters contained in the Intercommunication and Sound Agreement. The Letter of Assent provided, *inter alia*, that the authorization would be effective until terminated by written notice as set forth in the Intercommunication and Sound Agreement. On June 20, 1972, Respondent entered into another Non-Association Members Agreement with the Union.

The effective dates of the various Intercommunication and Sound Agreements between NECA and the Union were as follows:

July 1, 1965, to June 20, 1968
July 1, 1968, to June 30, 1971
August 22, 1971, to June 1, 1973
June 1, 1973, to May 31, 1975
June 1, 1975, to May 31, 1977
June 1, 1977, to May 31, 1978
June 1, 1978, to May 31, 1980

At no time following the signing of the Non-Association Members Agreement in 1972 has Respondent given the Union timely notice of revocation as required by the agreement. Thus, the collective-bargaining relationship between Respondent and the Union has been continuously ongoing since the signing of the June 1972 Non-Association Members Agreement.

[3] 227 NLRB 765 (1977), enfd. 596 F.2d 378 (9th Cir. 1979).

[4] See *Pullman Building Company*, 251 NLRB 1048 (1980).

[5] It is apparent from the record that a similar agreement was reached between Respondent and employee Kenneth C. Green.

[6] It is noted that each of the Intercommunication and Sound Agreements entered into by the Union and NECA between 1971 and 1978 con-

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Respondent to be unjustly enriched for successfully concealing its fraudulent and deceptive actions, and would further deprive the Union and the employees of the benefits to which they are entitled under the terms of the various collective-bargaining agreements.

The General Counsel has also excepted to the Administrative Law Judge's limitation of the remedy to May 31, 1980, the expiration date of the repudiated 1978–80 Intercommunication and Sound Agreement. The General Counsel argues that, since Respondent has failed to give the Union proper and timely written notice of its intent to terminate the Non-Association Members Agreement, Respondent continues to be bound to agreement and to the successor Intercommunication and Sound Agreement. We agree.

The Non-Association Members Agreement, signed by Respondent in June 1972, provides that it shall remain in effect unless notice of revocation is given at least 90 days prior to the expiration of the Intercommunication and Sound Agreement. In order to have revoked or terminated the agreement validly, Respondent was required to provide the Union notice prior to March 3, 1980. The Administrative Law Judge specifically found that "[a]t no time following the signing of the Non-Association Members Agreement in 1972 has the Respondent given the Union notice . . . terminating the various Intercommunication and Sound Agreements . . . ." Accordingly, having failed to provide proper notice Respondent is bound to comply with the terms of the Non-Association Members Agreement and the current Intercommunication and Sound Agreement. We, therefore, will expand the remedy, and order Respondent to comply with the Non-Association Members Agreement until such time as proper notice of revocation is given pursuant to the terms of the agreement.

We also find merit in the General Counsel's exception to the Administrative Law Judge's conclusion that Respondent's private wage agreements with its employees constituted a unilateral change in the terms and conditions of the collective-bargaining agreement. The Board does not consider such conduct to be in the nature of a unilateral change. Rather, the gravity of such conduct is its bypassing of the Union to deal directly with employees and, for that reason, the conduct is violative of Section 8(a)(5) and (1) of the Act. Accordingly, we shall modify the Conclusions of Law, the recommended Order, and the notice.

tained union-security, hiring hall, and trust fund contribution provisions. Respondent's unlawful conduct prevented the Union from enforcing these provisions. Consequently, the Union lost initiation fees and membership dues it would have received but for Respondent's unfair labor practices.

AMENDED CONCLUSIONS OF LAW

We hereby affirm the Administrative Law Judge's Conclusions of Law as modified below:

1. Substitute the following for Conclusion of Law 2:

"2. By bypassing the Union and directly dealing with employees by entering into a private agreement with employees to pay them at a wage scale less than the contractual wage rate required by the collective-bargaining agreement with the Union, Respondent has violated Section 8(a)(5) and (1) of the Act. Also, by deliberately avoiding the use of the Union's hiring hall when hiring new bargaining unit employees, and by submitting false trust fund reports and failing to make the contractually required payments to the union trust funds, Respondent has unilaterally altered the terms and conditions of the collective-bargaining agreement in effect between it and the Union in violation of Section 8(a)(5) and (1) of the Act."

AMENDED REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

We shall order Respondent to comply with the terms of the Intercommunication and Sound Agreements retroactively to June 23, 1972, the date it commenced its unfair labor practices; and prospectively until such time as Respondent provides proper and timely notice of revocation to the Union pursuant to the Non-Association Members Agreement. The Order will provide that Respondent shall make employees and the Union whole for the losses incurred as the result of Respondent's refusal to comply with the terms of said agreements. Backpay is to be computed in a manner consistent with the Board policy as set forth in *Ogle Protection Service, Inc., and James L. Ogle, an Individual*, 183 NLRB 682 (1970), with interest thereon as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977).[7] Additionally, we shall require Respondent to make the appropriate trust funds whole for losses suffered during the same period as a result of Respondent's failure to adhere to the Intercommunication and Sound Agreements.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Re-

[7] Members Jenkins would compute interest in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

lations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Pacific Intercom Co., Glendora, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) Failing and refusing to abide by the terms of the Intercommunication and Sound Agreements between the Los Angeles Chapter of the National Electrical Contractors Association and the International Brotherhood of Electrical Workers, Local 11, effective by the terms of said agreements from August 22, 1971, through May 31, 1980, by directly dealing with employees and by entering into a private agreement with employees to pay them at a wage scale less than the contractual wage rate required by the collective-bargaining agreements with the Union, by deliberately avoiding the use of the Union's hiring hall when hiring new bargaining unit employees, by submitting false trust fund reports, and by failing to make the contractually required payments to the union trust funds."

2. Substitute the following for paragraph 2(b):

"(b) Comply with the terms and conditions of the above-described Intercommunication and Sound Agreements retroactively to June 23, 1972, and prospectively until such time as proper and timely notice is given the Union pursuant to the Non-Association Members Signing, Union Agreement signed by Respondent in 1972, including making the appropriate trust funds, the employees, and the Union whole in the manner described in our amended remedy."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a full hearing at which the parties had an opportunity to present their evidence, the National Labor Relations Board has found that we, Pacific Intercom Co., violated the National Labor Relations Act, as amended, and has ordered us to post this notice and carry out its terms.

The Act gives all employees these rights:

To engage in self-organization
To form, join, or help a union
To bargain collectively through representatives of our own choosing
To act together for collective bargaining or other mutual aid or protection
To refrain from any all of these things.

WE WILL NOT refuse to bargain collectively with International Brotherhood of Electrical Workers, Local 11, as exclusive bargaining representative of our employees in the following appropriate unit with regard to rates of pay, wages, hours, and other terms and conditions of employment:

All employees performing electrical work for the Employer excluding all office clerical employees, guards and supervisors as defined in the Act, as amended.

WE WILL NOT fail and refuse to abide by the terms of the Intercommunication and Sound Agreements between the Los Angeles Chapter of the National Electrical Contractors Association and the above-named labor organization, effective by the terms of said agreements from August 22, 1971, and thereafter, until proper and timely notice of revocation is given the Union pursuant to the Non-Association Members Signing Union Agreement, by directly dealing with employees and by entering into a private agreement with employees to pay them at a wage scale less than the contractual wage rate required by the collective-bargaining agreements with the Union, by deliberately avoiding the use of the Union's hiring hall when hiring new bargaining unit employees, and by submitting false trust fund reports and failing to make contractually required payments to the union trust funds.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request, bargain collectively with the above-named Union as the exclusive bargaining representative of our employees in the above-described unit with regard to rates of pay, wages, hours, and other terms and conditions of employment.

WE WILL comply with the terms and conditions of the Intercommunications and Sound Agreements to which we are bound, retroactively to June 23, 1972, and until we give the Union timely notice of revocation, by not directly dealing with employees, by not entering into a private agreement with employees to pay them at a wage scale less than the contractual wage required by the collective-bargaining agreement with the Union, by not deliberately avoiding the use of the Union's

hiring hall when hiring new bargaining unit employees, and by not submitting false trust fund reports and failing to make the contractually required payments to the union trust funds.

WE WILL make our employees whole for any losses they may have suffered as a result of our failure to apply the terms and conditions of the Intercommunication and Sound Agreement, including making the necessary payment to the appropriate fringe benefit trust funds.

WE WILL make the Union whole, with interest, for any losses of initiation fees and membership dues it may have suffered as a result of our failure to apply the terms and conditions of the Intercommunication and Sound Agreements.

PACIFIC INTERCOM CO.

DECISION

STATEMENT OF THE CASE

GORDON J. MYATT, Administrative Law Judge: Upon a charge filed on September 6, 1979, and amended on November 19 by International Brotherhood of Electrical Workers, Local No. 11, AFL-CIO (hereafter called the Union), against Pacific Intercom Co. (hereafter called the Respondent), the Regional Director for Region 31 issued a complaint and notice of hearing on November 28.[1] The complaint alleges that the Respondent and the Union entered into a collective-bargaining agreement on June 20, 1972, and have been bound by successive collective-bargaining agreements to the present date. The complaint further alleges that on March 6 the Union, as the exclusive representative of the Respondent's employees, requested that the Respondent bargain collectively with it regarding the unit employees and the Respondent refused and continues to refuse to do so. Further, that since March 6 the Respondent has repudiated the terms and conditions of the collective-bargaining agreement in effect between it and the Union and continues to do so by: (1) refusing to make contractually required payments into various union trust funds; (2) entering into private agreements with employees to pay them less than contractually required wage rates; and (3) refusing to utilize the union hiring hall when hiring additional employees to perform unit work. The complaint alleges that by this conduct the Respondent has violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended (hereafter called the Act).

The Respondent filed an answer in which it admits certain allegations of the complaint, denies others, and specifically denies the commission of any unfair labor practices. By way of an affirmative defense, the Respondent's answer asserts that the agreement between it and the Union was an agreement governed by Section 8(f) of the Act and since the Union never achieved majority status among the bargaining unit employees, the Respondent was free to terminate the collective-bargaining relationship anytime during the term of the agreement.[2]

A hearing was held in this matter in Los Angeles, California, on April 17, 1980. All parties were represented and afforded full opportunity to examine and cross-examine witnesses and to present material and relevant evidence on the issues in controversy. Briefs were submitted by the parties and have been duly considered.

Upon the entire record in this case, including my observation of the witnesses and their demeanor while testifying, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Pacific Intercom Co., is, and has been at all times material herein, a California corporation with its office and principal place of business located in Glendora, California. The Respondent is engaged in the business of installing and servicing intercommunication sound systems, closed-circuit television systems, and burglar and fire alarm systems. In the course and conduct of its business operations, the Respondent annually purchases and receives goods and services valued in excess of $50,000 directly from suppliers located outside the State of California. Based on the above, I find, and the pleadings admit, that the Respondent is, and has been at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union, International Brotherhood of Electrical Workers, Local No. 11, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

[1] Unless otherwise indicated, all dates herein refer to the year 1979.

[2] Sec. 8(f) provides:

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such an agreement, or (2) such agreements require as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or give such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority and opportunities for employment based on length of service with such employer, in the industry or in the particular geographical area: *Provided*, that nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, that any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The History of the Collective-Bargaining Agreements Between the Respondent and the Union*

Prior to 1968, Ronald Podogil, owner of the Respondent, operated as a sole proprietorship engaged in the installation and servicing of communication and sound systems, closed-circuit TV systems, and security systems at new construction sites as well as in buildings being remodeled or renovated. Sometime in 1968 Podogil incorporated under the name of Pacific Intercom Co., and engaged in the same type of electronic installation and servicing work. While still a sole proprietor, Podogil executed an agreement with the Union on June 13, 1966, entitled, "Non-Association Members Signing Union Agreement" (hereafter called non-association members agreement). Under its terms, Podogil agreed to be bound by the contract—and any amendments, modifications, or additions thereto—between the Los Angeles Chapter of the National Electric Contractors Association (NECA) and the Union. (G.C. Exh. 2.) The NECA-Union agreement was known as the intercommunication and sound agreement. The non-association members agreement signed by Podogil provided that it would remain in effect unless notice of revocation were given by either party not less than 90 days prior to the expiration of the intercommunication and sound agreement. By signing the non-association members agreement, Podogil also revoked any prior designation made to any association, corporation, or individual to act as his collective-bargaining representative.

Within a month or so after signing the non-association members agreement (the record is unclear as to the exact date), Podogil signed a separate agreement with NECA entitled "Letter of Assent 'A.'" (G.C. Exh. 5.) By virtue of this latter agreement, Podogil again agreed to be bound by the intercommunication and sound agreement between NECA and the Union. He also authorized NECA to be his collective-bargaining representative for all matters contained in the intercommunication and sound agreement. The letter of assent further provided that the authorization remain in effect until terminated by written notice to NECA and the Union 30 days prior to the notification date provided in the intercommunication and sound agreement.

On September 30, 1968, Podogil, on behalf of the Respondent, sent letters to NECA and the Union terminating all previous letters of assent as well as its agreement with the Union (G.C. Exhs. 3 and 4). NECA responded through its labor relations director on October 8, 1968, advising the Respondent that its notice of termination was untimely since the current intercommunication and sound agreement was renegotiated with the Union on July 1 of that year. NECA informed the Respondent that it was bound by the agreement as long as it maintained its business in Los Angeles County, absent timely notice in accordance with the terms of the agreement. (G.C. Exh. 6.) There is no indication in the record as to whether the Respondent considered itself bound during the term of the agreement negotiated in 1968.

On June 20, 1972, the Respondent executed another non-association members agreement with the Union, the terms of which were identical to the provisions contained in the previous agreement executed in 1966. (G.C. Exh. 7.)[3] After the expiration of the 1973–75 contract, the Union struck the industry. In order to continue working, the Respondent entered into an "Interim Agreement" with the Union whereby it agreed to continue to be bound by the recently expired contract and any new agreement negotiated between NECA and the Union, retroactive to June 1, 1975. (G.C. Exh.9.) At no time following the signing of the non-association members agreement in 1972 has the Respondent given the Union notice, pursuant to the terms of that agreement, terminating the various intercommunication and sound agreements which were negotiated with NECA.

B. *The Respondent's Deliberate Efforts To Avoid the Terms of the Various Agreements With the Union*

It is clear from the evidence and the testimony that the Respondent never intended to abide by the terms of the intercommunication and sound agreements with the Union. Podogil testified that, when he signed the non-association members agreement in 1966, he was the only employee as well as the proprietor. In 1972, the Respondent had three employees performing the installation and service work at the time Podogil signed the second nonassociation members agreement.[4] Podogil stated he signed the agreement because his work was stopped on a project where the general contractor had an agreement that all subcontractors would be signatories to a union contract. In order to retain his work and to avoid being stopped on future jobs where such a requirement existed, Podogil signed the agreement in 1972.

The record indicates that the Respondent's work force—from the time Podogil began to hire employees until the time of the hearing herein—was permanent in nature. Employees were not hired for specific projects. The testimony shows that they went from job to job as the workload dictated. Nor were they paid on a per-job basis. Rather, they were on the Respondent's regular payroll for as long as they were employed. According to Podogil, the supervisors (the installation and the service managers) assigned the work and the locations to the employees and supervised them at each jobsite.

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[3] At the hearing, the parties stipulated that the effective dates of the Intercommunication and Sound Agreements between NECA and the Union pertinent to this case were as follows:

July 1, 1965 to June 20, 1968
July 1, 1968 to June 30, 1971
August 22, 1971 to June 1, 1973
June 1, 1973 to May 31, 1975
June 1, 1975 to May 31, 1977
June 1, 1977 to May 31, 1978
June 1, 1978 to May 31, 1980

All of the agreements contained union-security clauses, hiring hall provisions making the Union the exclusive source of referrals on a nondiscriminatory basis, and fringe benefit reporting requirements.

[4] Podogil testified that he had five employees at the time he signed the agreement in 1972. However, the summary of the employee complement over the years submitted by the Respondent (G.C. Exh. 16) discloses that only three individuals were employed at the time the 1972 nonassociation members agreement was signed. This summary comports with the testimony of Green and Spencer who were employees during this period.

Shortly before or shortly after signing the 1972 agreement (the record is unclear in this regard), Podogil approached employees Kenneth Green and Robert Spencer and suggested that it would be in the Respondent's and their mutual interest for them to join the Union.[5] It is apparent from the testimony that Podogil convinced the two employees that the Respondent would then be able to work union jobs without fear of being challenged and the employees would have a greater opportunity for continuous work. Podogil told Green and Spencer that he would pay their union dues, but he would not pay them the wage scale required by the collective-bargaining agreement. Both Green and Spencer accepted Podogil's proposition and executed an agreement with the Respondent setting forth their private arrangement.[6] Under the terms of this arrangement with the employees, the Respondent agreed to pay the union dues and "any additional expenses" [involved with the union membership] until the employees' wages reached 80 percent of the journeyman rate required by the collective-bargaining agreement. When this event occurred, the employees were to assume responsibility for their own union dues. The employees in turn agreed to accept the less than union scale for a period of 4 years or "until such time as [the Respondent] felt they had progressed to the top rate of pay." The employees also agreed not to hold the Respondent liable for the difference between the wage rates they would receive and the wage rates required by the collective-bargaining agreement. Spencer testified he and Green were told by Podogil that they would receive an hourly wage increase of 25 cents at 6-month intervals until their wage rates equaled that required by the union contract. The private arrangement also provided that any fringe benefits given to the employees by the Respondent, other than benefits required by the collective-bargaining agreement, would cease when the wage rate of the employees reached the contract rate for journeymen.

According to the uncontroverted testimony, after Green and Spencer became union members, the Respondent concealed the fact that the employees were receiving less than union scale by issuing two separate pay stubs to them for each pay period. One pay stub reflected the actual wages paid to the employees and the other showed that the employees were being paid at the union scale. Green and Spencer retained the false pay stubs in their possession so that in the event they were challenged on a particular job, they could establish they were being paid at the journeyman rate. In addition, the Respondent followed a practice of sending the two union members out on all jobs where it was known that a union subcontractor was required. The Respondent would then replace Green or Spencer with employees who were not union members when it was determined that it was safe to do so without the nonunion employees being challenged at the jobsite.[7] The evidence establishes that the Respondent consistently followed these practices (issuing false pay stubs and substituting nonunion members for Green or Spencer) from the time it executed the agreement with the Union in 1972 until it abrogated the collective-bargaining agreement with the Union in 1979.

Whenever the Respondent acquired jobs in areas outside the geographical jurisdiction of the Union, it would send either Green or Spencer to these jobsites. They in turn would report to the local having jurisdiction over the work. Instead of attempting to later substitute nonunion employees on these jobs, the Respondent would secure any additional employees it needed through the hiring hall of the area local.[8]

The terms of the Intercommunication and Sound Agreement also required the Respondent to submit monthly reports and payments to the Union for the National Electrical Benefit and Industry funds. In addition, the Respondent was required to and did make periodic payments into the Apprenticeship Training and Payroll Guarantee funds (G.C. Exh. 8). On each monthly report, the Respondent had to designate the number of individuals it employed during the reporting period. From the time the Non-Association Members Agreement was signed in 1972 until the abrogation of the union contract in 1979, the Respondent filed monthly reports showing that it only had two people (Green and Spencer) performing bargaining unit work. Payments were made into the various funds based on the purported number of hours Green and Spencer worked during the reporting period.

Contrary to the false monthly reports submitted to the Union, the following tabulation, taken from the summaries in evidence, shows that for each month following the signing of the 1972 agreement, the Respondent had employees performing bargaining unit work in addition to Green and Spencer:

Month	*1972*	*1973*	*1974*	*1975*	*1976*	*1977*	*1978*	*1979*
Jan.		4	4	4	7	6	5	5
Feb.		5	4	4	7	6	5	5

[5] Arthur Webster, current business representative for the Union, testified that the Union only had two classifications of members; i.e., journeymen and apprentices. Thus, when a new employer signed a contract with the Union, he was permitted to determine which of his current employees would be placed in the journeyman classification based on their experience and the journeyman requirements established by the collective-bargaining agreement. Any employee not so selected had to be terminated and all additional employees were to be hired through the Union's referral system.

[6] See G.C. Exh. 17 for the arrangement with Spencer. It is apparent that Green signed a similar agreement, but it was not introduced into evidence.

[7] The Respondent did this in spite of the fact that when Podogil wrote to the Union in 1972 requesting a nonassociation members agreement, he assured the Union that if additional employees were required on a job, he would get them through the hiring hall. (G.C. Exh. 18.)

[8] Webster testified that under the terms of the collective-bargaining agreement, when a signatory contractor performed work outside the area of the Union's geographical jurisdiction, he was permitted to take only one employee. Any additional employees had to be secured through the hiring hall of the sister local.

Month	*1972*	*1973*	*1974*	*1975*	*1976*	*1977*	*1978*	*1979*
March		4	4	4	6	6	5	5
April		4	4	4	6	6	7	6
May		4	4	4	6	6	7	4
June	3	4	4	4	6	6	7	5
July	3	4	4	5	6	5	7	6
Aug.	3	4	4	5	6	3	5	6
Sept.	3	4	4	5	6	3	5	6
Oct.	3	4	4	5	6	3	5	6
Nov.	3	4	5	6	6	4	5	6
Dec.	4	4	4	6	6	4	5	6

It is undisputed that of the employees performing unit work, only Green and Spencer were union members. It is also evident from the testimony that all of the nonunion employees were paid at a wage rate lower than the rate received by Green and Spencer—who in turn were receiving less than union scale.

Sometime in late 1977, the Respondent promoted Spencer to the position of installation manager.[9] Although Spencer worked with his tools on occasion, he was primarily responsible for hiring, firing, assigning, and supervising the employees performing the installation work. During the time that Spencer was installation manager, the Respondent continued to list him on the monthly reports to the Union as one of the two bargaining unit employees and made payments to the various trust funds based on this purported employee complement. Sometime in March 1979, Spencer ceased to be installation manager and reverted back to bargaining unit status. Several weeks later (April 1979), Spencer terminated his employment with the Respondent. The records show that the Respondent submitted a combined report for the months of April and May 1979 to the Union. (G.C. Exh. 15.) This report indicated that the Respondent did not have any employees performing unit work during those months. The final report submitted for June 1979 listed the names of Green and Spencer, but indicated that Spencer was no longer employed by the Respondent and Green "was not working under this application." (G.C. Exh. 14.)

C. *The Abrogation of the Collective-Bargaining Agreement by the Respondent*

In April 1979, Spencer telephoned Webster, the business representative of the Union, and informed him that the Respondent was not paying contract wage rates or fringe benefits and was employing nonunion members on union jobs. Webster asked him to put the information in a letter and, when it was received, proceeded to conduct an investigation of the Respondent's operation. Based on his findings, Webster instituted a grievance proceeding with the joint conference committee against the Respondent for breach of contract.[10] On May 1, Respondent, through its consultant, advised the Union that it was terminating the contract since it was an 8(f) agreement and the Union was not certified as the bargaining representative of a majority of the Respondent's employees. (G.C. Exh. 24.) A hearing was held before the joint conference committee on May 22, but the Respondent did not appear. The committee issued an arbitration award on July 24 ordering the Respondent to: (1) make payments into various trust funds; (2) make payments of wages to certain union members who would have been referred to the Respondent over the years through the hiring hall but for the deception practiced by the Respondent; and (3) submit its records for an audit by the trustees of the various funds. (G.C. Exh. 22). The Respondent replied to the arbitration award on August 7, repudiating the findings of the Committee and refusing to comply with the award.

Concluding Findings

The Respondent defends this case on numerous grounds. First, it argues that a finding that its conduct is unlawful is time-barred since the contract with the Union was repudiated and the unilateral changes in the terms and conditions of employment were made well outside of the 6-month limitation period imposed by Section 10(b) of the statute.[11] Next, the Respondent contends that the 1972 nonassociation members agreement binding it to the intercommunication and sound agreement was a prehire contract under Section 8(f) and, as such, never matured into a full bargaining relationship since the Union never achieved majority status among the employees. Although the Respondent seems to concede that when the 1972 agreement was executed, two of the three employees in the then work force became union members, it asserts that their memberships were coerced by Podogil and therefore tainted and not reflective of the free choice of the employees. The Respondent further contends that

[9] Spencer first testified that he became installation manager in 1979. He later recalled that he was promoted to this position during the latter part of 1978. David Gellatly, who became the service manager at the same time that Spencer was promoted to installation manager, testified that the promotions occurred in late 1977. Because of Spencer's apparent confusion over the year in which the promotions occurred, I rely on Gellatly's testimony and find that they became supervisors sometime in 1977.

[10] The Joint Conference Committee is composed of local labor and management representatives in the industry.

[11] Sec. 10(b) provides in part:

> (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board . . . shall have the power to issue and cause to be served upon such person a complaint stating the charges in that respect . . . *Provided*, That no complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon a person against whom such charge is made . . . .

under the Supreme Court's decision in *Higdon Contracting Co.*,[12] and the Board's decisions in *R. J. Smith Construction Co. Inc.*,[13] and *Ruttman Construction Company*,[14] the Union never became the majority representative at any of the jobsites or projects where unit work was performed. Therefore, according to the Respondent, it was free to repudiate the collective-bargaining agreement and withdraw recognition of the Union at any time without violating Section 8(a)(5) of the Act. In addition, the Respondent argues that the Union did not represent a majority of the unit employees at the time of the repudiation of the agreement in 1979, and under the Board's decision in *Haberman Construction Company*, 236 NLRB 79 (1978), an 8(a)(5) violation cannot be sustained. Finally, the Respondent contends that it did not voluntarily enter into the 1972 agreement with the Union, but was coerced into doing so in order to retain the work being performed at that time. Presumably this compelled the Respondent to engage in what it characterizes as 8(a)(2) conduct by placing two employees in the Union and paying their union dues until the agreement was abrogated within the 10(b) period.

The General Counsel, on the other hand, argues that while the 1972 agreement was an 8(f) agreement, it matured into a full bargaining relationship when two of the Respondent's three employees became union members shortly thereafter. Since the Respondent never gave a timely notice of termination during the successive collective-bargaining agreements, there was an irrebuttable presumption that the Union was the majority representative of the employees during the life of the agreements, and any mid-term repudiation of the contract was unlawful. Furthermore, the General Counsel contends the Respondent is estopped from asserting that the Union's majority status was coerced after the signing of the 1972 agreement since the coercion, if any, was the product of the Respondent's own unlawful conduct. The General Counsel further argues that the Respondent is likewise estopped from questioning the Union's majority status during the term of the 1978–80 agreement because its deceitful and fraudulent conduct, following the signing of the 1972 agreement, prevented the Union from asserting and enforcing the union security and hiring hall provisions in the successive agreements until the violations were discovered in April 1979.

In analyzing the numerous and converse arguments, I am of the opinion that the record here fully supports the finding of a violation of the Act. Perhaps the best starting point is to dispose of those areas where the parties are in agreement. The parties concur through the pleadings that all of the Respondent's employees performing electrical work constitute an appropriate unit for purposes of collective bargaining. It is also conceded in the briefs that by signing the 1972 nonassociation members agreement, the Respondent and the Union entered into a so-called 8(f) prehire agreement covering these unit employees. That the 1972 agreement was lawful under the statute is without question, since Section 8(f) permits prehire agreements to be "entered into when an employer has already hired employees who will be covered under such a contract." See *D'Angelo & Kahn, Inc.*, 248 NLRB 396, fn. 4 (1980), and the cases cited therein.

The Respondent's claim that it was coerced into executing the 1972 agreement cannot be entertained at this juncture since the alleged coercion, if indeed it ever existed, took place well beyond the 6-month period of limitation set forth in Section 10(b). *Local Lodge No. 1424, International Association of Machinists, AFL–CIO [Bryan Manufacturing Co.]* v. *N.L.R.B.*, 362 U.S. 411 (1960). Therefore, while inquiry into the validity of the 1972 agreement is now foreclosed, it is permissible to examine the nature of the contract involved in order to determine what type of bargaining relationship resulted from the execution of that agreement. *R. J. Smith Construction Co., supra* at 695.

The uncontroverted evidence discloses that several days after the execution of the 1972 prehire agreement, two-thirds of the Respondent's complement of unit employees became members of the Union. The contention that the achievement of this majority status was tainted and therefore invalid, because the Respondent coerced the employees into joining the Union and paid their union dues, must be rejected. As this conduct would have violated Section 8(a)(2) of the Act, the Respondent is attempting here to raise its own unlawful actions as a defense to this majority claim. This it cannot be permitted to do. Thus, the Respondent is estopped from now asserting its own unlawful conduct in an effort to defeat the Union's majority status among the unit employees after the signing of the agreement in 1972. *Barwise Sheet Metal Co., Inc., a Division of Airtran Inc., et al.*, 199 NLRB 372, 379 (1972).

Accordingly, I find that within a matter of days the bargaining relationship between the Respondent and the Union progressed from one under Section 8(f) to a full bargaining relationship under Section 9(a) of the Act. *Ellis Tacke, d/b/a Ellis Tacke Company*, 229 NLRB 1296, 1303 (1978); *Amado Electric, Inc.*, 238 NLRB 37 (1978). As such, the Respondent was not privileged to unilaterally alter or change the terms and conditions of employment set forth in the collective-bargaining agreement, and the majority status of the Union was irrebuttably presumed during the term of the agreement. Since the Respondent thereafter became party to successive collective-bargaining agreements through the execution of the nonassociation members agreement in 1973, the interim agreement in 1975, and successive nonassociation members agreements in 1977 and 1978, this full bargaining relationship continued unbroken through the current contract term. Consequently, each successive agreement likewise carried with it an irrebuttable presumption that the Union was the majority representative of the unit employees. Therefore, the Respondent could not unilaterally alter the terms of these agreements nor could it lawfully abrogate the agreements in mid-term. *Ellis Tacke Company, supra.*

[12] *N.L.R.B.* v. *Local Union No. 103 International Association of Bridge, Structural & Ornamental Ironworkers, AFL–CIO [Higdon Contracting Co.]*, 434 U.S. 335 (1978).

[13] *R. J. Smith Construction Co., Inc.*, 191 NLRB 693 (1971), enforcement denied *sub nom. Local 150, International Union of Operating Engineers, AFL–CIO* v. *N.L.R.B.*, 480 F.2d 1186 (D.C. Cir. 1973).

[14] *Ruttmann Construction Company*, 191 NLRB 701 (1971).

The Respondent cannot now be heard to say that the Union did not represent a majority of the unit employees after December 1972 or that it did not represent a majority at the time the contract was repudiated in 1979. It is clear on this record that the fraudulent and deceptive practices engaged in by the Respondent prevented the Union from enforcing the union security, hiring hall, and trust fund contribution provisions in the collective-bargaining agreements over the years. By issuing false pay stubs to Green and Spencer, by making use of hiring halls of sister locals when working outside the Union's geographical jurisdiction, by avoiding the use of the Union's hiring hall when additional unit employees were hired, by submitting false reports and payments based thereon to the various trust funds, and by continuing to execute successive agreements with the Union, the Respondent fraudulently and deceitfully prevented the Union from attempting to enforce the very provisions of the collective-bargaining agreement which would have allowed it to maintain the majority status achieved in 1972. I find, therefore, that the Respondent is estopped on equitable principles from now asserting that the Union was not the majority representative at the time the collective-bargaining agreement was repudiated in 1979.[15]

In light of the above, I find that the Respondent has violated Section 8(a)(1) and (5) of the Act by (a) unilaterally changing the terms and conditions of the collective-bargaining agreement governing its relationship with the Union and the unit employees, and (b) abrogating the collective-bargaining agreement in effect between it and the Union when it was not privileged to do so. *Amado Electric, Inc., supra; Davis Industries, Inc.*, 232 NLRB 946 (1977); *Ellis Tacke Company, supra.*

CONCLUSIONS OF LAW

1. Respondent Pacific Intercom Co. is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By entering into a private agreement with employees to pay them at a wage scale less than the contractual wage rate required by the collective-bargaining agreement with the Union, by deliberately avoiding the use of the Union's hiring hall when hiring new bargaining unit employees, and by submitting false trust fund reports, and failing to make the contractually required payments to the union trust funds, the Respondent has unilaterally altered the terms and conditions of the collective-bargaining agreement in effect between it and the Union in violation of Section 8(a)(1) and (5) of the Act.

3. By refusing to recognize or bargain with the Union as the exclusive collective-bargaining representative of its employees and by repudiating in May 1979 the collective-bargaining agreement in effect between it and the Union, the Respondent has violated Section 8(a)(5) and (1) of the Act.

4. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has committed unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, it shall be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. The General Counsel contends that since the Union, through no fault of its own, did not discover the violations until April 1979, due to the Respondent's fraudulent concealment of its actions, the proper remedial order should be retroactive to the date Respondent embarked upon this unlawful conduct when it signed the agreement on June 23, 1972. In this regard, the General Counsel cites the Board's decision in *Don Burgess Construction Corporation d/b/a Burgess Construction and Don Burgess and Verlon Hendrix d/b/a V & B Builders*, 227 NLRB 765, 766 (1977), enfd. 596 F.2d 378 (9th Cir. 1979). There the Board held the fraudulent concealment by the respondent of its unfair labor practices tolled the 10(b) period with respect to the filing of the charge, and "therefore that the limitation period was tolled in regard to the remedy as well." *Pullman Building Company*, 251 NLRB 1048 (1980).

As appealing as this argument may be in the circumstances of this case, I am of the view that while the fraudulent concealment tolls the limitation period as to the contract which was repudiated in 1979 it does not extend to all of the prior contracts between the Respondent and the Union, even though the line of succession from 1972 to date was unbroken and the unlawful conduct was the same. In my judgment, to go beyond the date of the agreement in effect at the time of the repudiation would cause the corrective action to become punitive rather than remedial. Accordingly, I find the proper make-whole remedy should be retroactive to the date the unfair labor practices commenced under the repudiated agreement, which is June 1, 1978.

Therefore, the Respondent shall be ordered to comply with the terms of the intercommunication and sound agreement effective from June 1, 1978, for the balance of its term. This shall include making employees whole for the losses they incurred as a result of the Respondent's refusal to abide by the terms of the agreement. Backpay is to be computed in a manner consistent with Board policy as set forth in *Ogle Protection Service, Inc., and James L. Ogle, an Individual*, 183 NLRB 682 (1970), with interest thereon as set forth in *Florida Steel Corporation*,

[15] Having so concluded, I do not deem it necessary to address the Respondent's claim that each successive agreement was an 8(f) contract and that the Union's majority status had to be established for each jobsite or project. Since I have found that the Respondent is foreclosed from questioning the Union's majority representation in the bargaining unit and that the bargaining relationship under the 1972 and the successive agreements had become a 9(a) relationship, this argument cannot be entertained. But even if I were to find that the contractual relationship was governed by 8(f), the Respondent would nevertheless be estopped from questioning the Union's majority at the time it repudiated the contract in 1979 because of the fraudulent concealment of its conduct. Therefore, a violation of Sec. 8(a)(5) would be found in any event. Cf. *V. M. Construction Co., Inc.*, 241 NLRB 584, fn. 1 (1979); *Haberman Construction Company, supra* at fn. 1.

231 NLRB 651 (1977).[16] In addition, the Respondent shall be required to make the appropriate trust funds whole for losses suffered during the same period as a result of its failure to abide by the terms of the Intercommunication and Sound Agreement.[17]

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[18]

The Respondent, Pacific Intercom Co., Glendora, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Brotherhood of Electrical Workers, Local No. 11, AFL–CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees performing electrical work excluding all office clerical employees, guards, and supervisors as defined in the Act, as amended.

(b) Failing and refusing to abide by the terms of the intercommunication and sound agreement between the Los Angeles Chapter of the National Electrical Contractors Association and International Brotherhood of Electrical Workers, Local No. 11, AFL–CIO, effective by its terms from June 1, 1978, through May 31, 1980.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment.

(b) Comply with the terms and conditions of the above-described intercommunication and sound agreement retroactively, including making the appropriate trust funds and employees whole in the manner described in the section of this Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary and relevant to a determination of the moneys due under the terms of this Order.

(d) Post at its Glendora, California, facility copies of the attached notice marked "Appendix."[19] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by the Respondent's authorized representative, shall be conspicuously posted immediately upon receipt thereof for 60 days thereafter in places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 31, in writing, within 20 days of the date of this Order, what steps the Respondent has taken to comply herewith.

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[16] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[17] No provision is made for the addition of interest at a fixed rate on unlawfully withheld trust fund payments. This is left to the compliance stage to determine whether any additional amounts must be paid into the trust funds in order to satisfy the "make-whole" remedy for the reasons stated by the Board in *Pullman Building Company, supra* at fn. 3.

[18] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[19] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."